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No. 78-1454

In the Supreme Court of the United States

OCTOBER TERM, 1978

NOVELLA H. TRAGESER, PETITIONER

v.

LIBBIE REHABILITATION CENTER, INC.,
T/A LIBBIE CONVALESCENT HOME

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The United States Department of Health, Education, and Welfare (HEW) has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private

institutions and state and local governments. In accordance with Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976), the Secretary of HEW has promulgated detailed regulations concerning compliance with Section 504.[1]

This case involves the proper scope and application of Section 504 in the context of employment discrimination against handicapped persons. The HEW regulations make clear that the broad language of Section 504 encompasses claims of employment discrimination. Indeed, significant numbers of private enforcement actions and approximately one-half of the administrative complaints filed with HEW under Section 504 involve claims of employment discrimination. The United States therefore has a substantial interest in the construction of Section 504, and has, accordingly, participated as amicus curiae in this case in the court of appeals, as well as in *Southeastern Community College* v. *Davis*, No. 78-711 (argued April 23, 1979).

QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits recipients of federal financial assistance from discriminating against handicapped persons with regard to employment decisions.

[1] Section 504 also requires each "executive agency" to promulgate regulations for implementation of the antidiscrimination provision in its programs.

STATEMENT

Respondent, a private corporation, operates a nursing home that receives substantial federal funding under various federal programs.[2] Petitioner, who is a registered nurse, commenced employment with respondent in 1971, and in 1975 was promoted to be director of nurses. Petitioner suffers from retinitis pigmentosa, a hereditary, progressive disease of the eyes, which impairs her vision. In April 1976, a state health inspector commented to the nursing home administrator that petitioner's eyesight had grown worse since his last inspection.[3] Shortly thereafter, respondent's board of directors voted to terminate petitioner's employment. Upon learning of the board's decision, petitioner resigned. (Pet. App. 3A-4A).

Subsequently, petitioner filed this suit in the United States District Court for the Eastern District of Virginia. She primarily alleged that her termination violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.[4] In August 1977, the district court dismissed the complaint for failure to state a

[2] Respondent admittedly receives Medicare payments under Title XVII of the Social Security Act, 42 U.S.C. 1395 *et seq.*; Medicaid payments under Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*; and Veterans Administration benefits, 38 U.S.C. 601 *et seq.* (R. 14-15).

[3] Although the inspector allegedly asked the administrator what was going to be done about petitioner's condition, he apparently did not direct that petitioner be fired.

[4] Petitioner also claimed that respondent had violated her constitutional rights (Pet. App. 3A; R.3). These claims are not before this Court.

claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The court concluded (a) that respondent's relationship to, and supervision by, the State of Virginia did not rise to the level of state action; (b) that no implied private right of action arises under Section 504; and (c) that the federal monies received by respondent did not constitute "Federal financial assistance" within the purview of Section 504 (Pet. App. 11A-14A).

On appeal, the court affirmed the judgment of the district court, but on substantially different grounds. Following the initial briefing in the court of appeals, Congress passed the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978 ("the 1978 Amendments"), Pub. L. No. 95-602, 92 Stat. 2955. The court of appeals requested supplemental briefing on the effect of these amendments on petitioner's claims. In particular, the court focused upon Section 505(a)(2) of the Rehabilitation Act (to be codified at 29 U.S.C. 794(a)(2)), as added by Section 120 of the 1978 Amendments, 92 Stat. 2983. That statute provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * under section 504 * * *." The court thereafter held that Section 505(a)(2) rendered Section 504 inapplicable to claims of employment discrimination "unless a primary objective of the federal financial assistance is to provide employment" (Pet. App. 8A). In the court of appeals' view, Section 505(a)(2) was intended to incorporate the

standards of Section 604 of Title VI, 42 U.S.C. 2000d-3, which states that Title VI covers claims of employment discrimination only "where a primary objective of the Federal financial assistance is to provide employment."

DISCUSSION

This case presents an important question concerning the scope of Section 504 of the Rehabilitation Act of 1973. Prior to the decision below, a majority of the complaints received by HEW under Section 504 involved claims of employment discrimination.[5] And regulations adopted by HEW, the agency charged with the responsibility for defining the practices that constitute discrimination and for coordinating implementation of Section 504 among federal departments and agencies, explicitly apply to discrimination in employment by any federal aid recipient. 45 C.F.R. 84.11-84.14. The severe limitation placed upon the applicability of Section 504 by the court of appeals will undoubtedly affect the willingness of recipient-employers to comply voluntarily with

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[5] In September 1977, David Tatel, Director of HEW's Office for Civil Rights, stated, in testimony before the Subcommittee on Select Education of the House Committee on Education and Labor, that as of that date approximately 70% of the Section 504 complaints received by his office involved employment discrimination. *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor* (hereinafter "Implementation Hearings"), 95th Cong., 1st Sess. 303, 317 (1977). In fiscal year 1978, 640 of the 1,363 complaints filed by handicapped individuals with HEW alleged employment discrimination.

Section 504 and its implementing regulations, to cooperate with an administrative investigation, or to conciliate regarding a probable violation (except in the relatively few instances where a primary purpose of the federal financial assistance is to provide employment).[6] In sum, the decision of the court of appeals that the recent amendments to the Act limit employment coverage to those instances where the primary objective of the federal assistance is to provide employment will have a significant effect upon enforcement of the statute.

One of the explicit purposes of the Act as passed in 1973 was to (29 U.S.C. 701(8))

> promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.

The non-discrimination provision contained in Section 504 was designed to insure that handicapped persons who had the ability to work and live independently in their communities would not be precluded from doing so because of discrimination based on their handicap (see point 1, *infra*). The decision of the court of appeals thus squarely conflicts with the congressional purpose that expressly underlies the Act.

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[6] For example, this decision has already been cited by defendants in a private suit under Section 504 arising outside of the Fourth Circuit. See *Hart* v. *County of Alameda*, No. C-79-0091 WHO (N.D. Cal. April 20, 1979).

Because Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, does not apply to employment discrimination against handicapped persons, the applicability of Section 504 to employment is essential to the accomplishment of a major purpose of the Rehabilitation Act. Employment discrimination against the handicapped, therefore, is not analogous to the situation under Title VI of the 1964 Act, where express limitations on the extent to which Title VI applies to employment discrimination merely carve out an area for exclusive enforcement under Title VII. In holding that those limitations should be carried over, by implication, to Section 504, the court of appeals has raised a question that threatens to disrupt HEW's on-going enforcement program. That decision warrants this Court's review.

1. As the court of appeals implicitly recognized, there is no doubt that prior to the 1978 Amendments, Section 504 prohibited any employer that received federal financial assistance from discriminating against otherwise qualified handicapped persons. The broad language of Section 504 makes no exception for discrimination in employment. Nor is such an exception fairly implied from the structure of the Act as a whole,[7] the pertinent legislative his-

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[7] See Section 2(8) of the Act, 29 U.S.C. 701(8), quoted *supra*. Indeed the Act originally defined handicapped persons in terms of their employability. See Pub. L. No. 93-112, Section 7(6), 87 Stat. 361, to be codified at 29 U.S.C. 706(6). In 1974, Congress amended Section 7(6) to emphasize that the defintion of handicapped person applicable to Section 504 is

tory,[8] or HEW's regulations.[9] To the contrary, these sources demonstrate with clarity that Section 504 applied to the employment decisions of all recipients of federal funds, and not just those who receive federal assistance for the purpose of providing employment. Accord, *Gurmankin* v. *Costanzo*, 556 F.2d 184, 186 (3d Cir. 1977); *Whitaker* v. *Board of Higher Education*, 461 F. Supp. 99 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Duran* v. *City of Tampa*, 430 F. Supp. 75 and 451 F. Supp. 954 (M.D. Fla. 1977 and 1978). In light of this well-established construction of Section 504 and the aforementioned lack of overlap between Section 504 and Title VII of the 1964 Act, the court of appeals' limiting interpretation of this remedial statute would be justified only if the 1978 Amendments unequivocally required such a result. However, neither the language nor the legislative history of the amendments

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"not to be narrowly limited to employment." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 37 (1974). See Pub. L. No. 93-516, Section 111(a), 88 Stat. 1619.

[8] See, *e.g.*, S. Rep. No. 93-318, 93d Cong., 1st Sess. 18-19, 70 (1973); S. Rep. No. 93-319, 93d Cong., 1st Sess. 2, 8 (1973); S. Rep. No. 93-1139, 93d Cong., 2d Sess. 23-25 (1974); S. Rep. No. 93-1297, *supra*, at 38; 119 Cong. Rec. 24587-24588 (1973) (remarks of Sen. Williams); *Rehabilitation Act of 1972: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 537, 1089, 1343-1363 (1972).

[9] See 45 C.F.R. 84.3(f), 84.3(k)(1), 84.11-84.14, 85.3(d), 85.52-85.55. See also 43 Fed. Reg. 2133-2135 (1978).

suggests that Congress intended to circumscribe the scope of Section 504.

2. *a.* The court of appeals concluded that Section 505(a)(2) grafted the substantive limitation found in Section 604 of Title VI onto Section 504. But Section 505(a)(2) says nothing about the scope of Section 504's coverage. It merely provides that the "remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved" by a violation of Section 504. This language strongly suggests that Congress intended Section 505(a)(2) to clarify or expand the remedies, procedures and rights previously "available" to handicapped individuals. See S. Rep. No. 95-890, 95th Cong., 2d Sess. 4 (1978). Had Congress sought to limit the scope of Section 504, it would have been far more natural to use a phrase such as "governed by" or "subject to" the provisions of Title VI, rather than a sentence making the remedies, procedures and rights of Title VI "available" to persons asserting claims under Section 504.

b. Moreover, nothing in the legislative history supports the conclusion of the court of appeals. Indeed, the legislative history makes clear that Section 505(a)(2) was intended only to provide a statutory basis for the administrative enforcement of Section 504. Although Section 504 was modeled after the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C.

1681, Congress omitted in 1973 to enact an administrative enforcement scheme applicable to Section 504 comparable to that included in Title VI (42 U.S.C. 2000d-1, 2000d-2) and Title IX (20 U.S.C. 1682, 1683). Congress subsequently recognized this omission, and initially directed that the appropriate executive agencies promulgate regulations to fill this void. See S. Rep. No. 93-1297, *supra*, at 39-40. Despite the congressional command, no regulations were immediately forthcoming. In April 1976, President Ford directed HEW to coordinate the implementation of Section 504 and to promulgate regulations governing compliance with, and enforcement of, that statute. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).

In May 1977 and January 1978, the Secretary of HEW issued comprehensive regulations in accordance with the presidential and congressional directives described above. See 45 C.F.R. Parts 84 and 85. Sections 84.61 and 85.5 of these regulations incorporate by express reference the administrative enforcement procedures applicable to Title VI. And the Senate Report accompanying the 1978 Amendments specifically points out that Section 505(a)(2) was intended merely to codify Sections 84.61 and 85.5 of the regulations:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practices as a specific statutory requirement.

S. Rep. No. 95-890, *supra*, at 19. In short, Section 505(a)(2) constitutes a "clarification and expansion" rather than a severe limitation on the applicability of Section 504. See *id.* at 4.[10]

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[10] Indeed, the continuing concern of Congress for the employment problems of the handicapped is reflected throughout the 1978 Amendments and their legislative history. For example, the 1978 Amendments include an Employment Opportunities for Handicapped Individuals Act (designated Title VI of the Rehabilitation Act). See Pub. L. No. 95-602, Section 201, 92 Stat. 2989-2995, to be codified at 29 U.S.C. 795 note. In addition, Section 122(a)(6) of the 1978 Amendments amended the definition of handicapped person applicable to Sections 503 and 504 "as such sections relate to employment." See 92 Stat. 2984-2985. See also, Sections 111(12) and 115( ) of the 1978 Amendments, 92 Stat. 2967, 2971. Moreover, the legislative history clearly evidences Congress' understanding that Section 504 broadly "prohibits discrimination solely by reason of handicap in *any* program or activity receiving Federal financial assistance," 124 Cong. Rec. S15568 (daily ed. Sept. 20, 1978) (remarks of Sen. Hathaway) (emphasis supplied), and that in particular Section 504 was designed to "insure better accessibility to jobs." *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 268 (1978). See also *id.* at 96, 266, 743; H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); H.R. Rep. No. 95-1188, 95th Cong., 2d Sess. 4 (1978); S. Rep. No. 95-890, *supra*, at 8, 13, 20-21, 27, 36; H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978); 124 Cong. Rec. S15548 (daily ed. Sept. 20, 1978) (remarks of co-sponsor Sen. Randolph); *id.* at S15557-S15560 (remarks of Sen. Javits); *id.* at S15571 (remarks of Sen. Dole); *id.* at S18996-S18997 (daily ed. Oct. 14, 1978) (remarks of Sen. Randolph); *id.* at H3965-H3966 (daily ed. May 16,

c. Finally, the court of appeals' reconstruction of Section 504 is directly in conflict with the regulations promulgated by HEW. Subpart B of those regulations expressly prohibits all recipients of federal financial assistance from discriminating in employment against handicapped persons. See 45 C.F.R. 84.11-84.16. And the explanatory comments to Subpart B specifically enumerate nursing homes such as respondent as typical recipients of federal funds subject to the employment provisions. See 45 C.F.R. Part 84, Appendix A at 381. This administrative construction by the agency in charge of enforcing Section 504 is entitled to great deference, especially where, as here, the regulations have been reviewed and accepted by Congress in the course of revising and reconsidering the statute in question.[11] See *Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-581 (1978);

1978) (remarks of co-sponsor Rep. Brademas); *id.* at H3967 (remarks of Rep. Biaggi); *id.* at H3971 (remarks of Rep. Jeffords); *Implementation Hearings, supra*, at 51-57, 63-64, 68, 71, 73-74, 207, 214-215, 241, 243, 247, 253-254, 259, 294-295, 303, 315-319, 341, 426-430, 460-463, 464, 470; *Rehabilitation Amendments of 1978: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 93, 122, 179-184, 243-244 (1978); *Rehabilitation Extension Amendments of 1977: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 20, 555 (1977).

[11] See *Southeastern Community College* v. *Davis*, No. 78-711 (argued April 23, 1979), Brief for the United States as Amicus Curiae, at 45-55. A copy of this brief has been sent to counsel for respondent in this case.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 380-382 (1969).[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[12] The district court dismissed this complaint because (a) Medicaid, Medicare and Veterans benefits do not constitute "Federal financial assistance," and (b) there is no implied right of action under Section 504. HEW's regulation squarely reject the former contention, see 45 C.F.R. Part 84, Appendix A, Sections 1 and 2, and the latter issue is currently before this Court in *Southeastern Community College* v. *Davis, supra*. We note, however, that unlike the state institution in *Southeastern*, respondent is a private corporation not subject to suit under 42 U.S.C. 1983. See also *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979).

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